79-1173

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

JANUARY TERM, 1980

CHARLES JOSEPH STEMPER

-vs-

STATE OF INDIANA

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE

STATE OF INDIANA

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A.

REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

On July 16, 1979, the Court of Appeals of Indiana (Fourth District), rendered a memorandum decision, not for publication, denying the Petitioner's Appeal of his Conviction of Voluntary Manslaughter in the Superior Court of Lake County, Indiana, which opinion is appended hereto as Appendix A.

On August 13, 1979, the same Court denied Petitioner's petition for rehearing which order is appended hereto as Appendix B.

On November 2, 1979, the Supreme Court of the State of Indiana denied petition to transfer, which order is appended hereto as Appendix C, and was served upon petitioner's counsel by regular mail and was received November 5, 1979.

B.

JURISDICTION

The United States Supreme Court has jurisdiction to grant this Petition for Writ of Certiorari

for the following reasons:

A. 28U.S.C. 1257 provides in part, that when a state statute is attacked as invalid because it is repugnant to the Constitution of the United States, then a Writ of Certiorari is proper; and

B. The Petitioner herein claims that the Indiana Statute concerning Voluntary Manslaughter, as applied by the Indiana Courts is unconstitutional in that it shifts the burden of proof on the defendant in a case charged with murder and thereby denies his rights under the Fifth and Fourteenth Amendments to the United States Constitution. Said statute is appended as Appendix D and the Constitutional Amendments are appended as Appendix F.

As stated in subsection B, infra., the judgments, opinions and orders ot the Appellate Court and Supreme Court of Indiana are appended hereto and the order denying transfer to the Indiana Supreme Cours was entered November 2, 1979.

C.

QUESTIONS PRESENTED FOR REVIEW

Whether the Indiana Statute on Voluntary Manslaughter as interpreted by the Indiana Courts, shifts the burden of proof of one of the elements of that crime, specifically "sudden heat" to the defendant in the context where said defendant is charged with

murder as a mitigating fact of intent (malice) and thereby violates the defendant's right to due process of law by such shifting of the burden of proof. This, the petitioner contends, puts the State of Indianain a position between that of New York in Patterson and Maine in Mullaney, and the question becomes whether this Court should grant this Petition to draw the line and clear the void.

D.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions the Petitioner's claims are relied upon and violated by the Indiana Courts are the Fifth and Fourteenth Amendments to the United States Constitution and the Indiana Statute on Voluntary Manslaughter which are appended hereto in Appendix D and F.

E.

STATEMENT OF FACTS

The question regarding Constitutionality of the Indiana Manslaughter was raised by the Petitioner

in his Appellate brief and it was claimed therein that although this issue was not raised at the trial or on the Motion to Correct Errors subsequent to verdict, the issue was fundamental error and, therefore, could be raised on appeal. The Indiana Appellate Court in its decision ruled that there was no fundamental error because there was no unconstitutional shifting of the furden of proof (Appendix A, p. 17).

The Petitioner was charged with Murder in the First degree by way of grand jury indictment. Upon trial by jury, the Petitioner was convicted of Voluntary Manslaughter on September 22, 1977, for the intentional killing of a twenty-four (24) month old child while babysitting. Indiana case law (see Argument section) requires "sudden heat" upon sufficient provocation. Under the charges of Murder, the defendant was required to attempt to prove sudden heat himself to reduce the possible result to a manslaughter conviction, rather than murder.

F.

ARGUMENT

The Indiana case-law regarding whether or not "sudden heat" is an essential element of the crime of voluntary manslaughter has been and still is less than clear. There is ample older authority to support the idea that "sudden heat" is an element of voluntary manslaughter. Fisher vs. State, (1973), 259 Ind. 633, 291 N.E.2d 76; Nuss vs. State, (1975), ___Ind. App.___, 328 N.E.2d 747. However, these authorities invariably conclude that "sudden heat" is not an element which the state must prove in order to support a conviction of voluntary manslaughter. For example:

> The rule has been that if there is evidence which would support a conviction of murder in either degree, then the jury has the right to find the defendant guilty of voluntary (or involuntary) manslaughter as a lesser included offense, even in the absence of proof of sudden heat. Nuss supra at 239 quoting Hopkins vs. State, (1975), ___Ind. App.___, 323 N.E.2d 232.

Thus, numerous Indiana decisions would conclude that on the one hand sudden heat is an element of voluntary manslaughter, but on the other hand, it is not an element which the State must prove. This

conclusion is contrary to the basic rule of law that the prosecution must prove, beyond a reasonable doubt, each and every element of the crime with which the defendant is charged. Arthur vs. State, (1949), 227, Ind. 493, 86 N.E.2d 698; Underwood vs. State, (1977), ___, Ind. App.___, 367 N.E.2d 4. Moreover, the United States Supreme Court has held this to be a rule of Constitutional dimensions in Re Winship, (1970), 397, U.S. 364.

Therefore, if "sudden heat" is an essential element of voluntary manslaughter, Due Process requires that the State prove such element beyond a reasonable doubt.

The rule in Indiana in later cases now appears to adopt the alternative explanation for the role of "sudden heat" in Indiana homicide-law found in Holloway vs. State, (1976), ___Ind. App.___. 352, N.E.2d 523, and cases cited therein. The Holloway Court quoted the Indiana Supreme Court's decision in Hasenfuss vs. State, (1901), 156, Ind. 246, 249, 59 N.E. 463, 465, which stated that "an indictment for murder in the first degree is really an indictment for one of three distinct crimes, namely, murder in

the first, murder in the second degree, and manslaughter." Holloway, supra at 526. The element of malice is required for a conviction of either degree of murder but not for manslaughter. Under this view, sudden heat is in the nature of an affirmative defense or a mitigating factor which serves to negate the element of malice thereby reducing an intentional killing from murder to manslaughter. Holloway, supra at 526. Technically, sudden heat would not be an element of manslaughter which the State would need to prove beyond a reasonable doubt.

In the context of a murder trial, the practical effect of this reasoning would be to shift the burden of proving "sudden heat" to the defendant. Obviously, the prosecution would not be disposed to proving sudden heat when such proof would serve to negate an essential element of the murder charge. Thus, if a defendant who is charged with murder in either degree wishes to see the crime reduced to voluntary manslaughter, the burden of proving sudden heat is his.

Shifting the burden of proving sudden heat to

the accused in a murder trial was declared unconstitutional by this Court in Mullaney vs. Wilbur, (1975) 421, U.S. 684. Mullaney involved homicide statutes which were significantly similar to Indiana murder and manslaughter laws. (Appendix E). In Mullaney, the defendant was convicted by a jury of murder. The defendant had argued that the crime, if any, was manslaughter since it was committed in a sudden heat. Maine law required a defendant charged with murder to prove, by a prepondence of evidence, that the killing occurred in a sudden heat in order to reduce the crime to manslaughter. This Court found that this procedural scheme violated the Due Process Clause of the Fourteenth Amendment. Id. at 704.

In Mullaney, this Court relied heavily upon In Re Winship, supra, and its rule that the reasonable-doubt standart is of constitutional dimensions. Mullaney recognized that there was a direct relation between sudden heat in the manslaughter statute and the element of malice in murder in that proof of the former negated the latter. In addition, malice was to be conclusively presumed upon proof that the killing was intentional. The result of this presumption was to require the defendant to negate an essential element of murder, thus freeing the State from the necessity of proving malice beyond a reasonable doubt.

This Court concluded that under the Maine statutes, Due Process requires the State to prove absense of sudden heat beyond a reasonable doubt in order to sustain a murder conviction. Mullaney, at 704.

Petitioner submits that the applicable Indiana homicide law is the functional equivalent of that found to be unconstitutional in Mullaney. Admittedly, Indiana has not expressly recognized that the burden of proving sudden heat is on the defendant. However, the direct relationship between sudden heat and malice which the Mullaney Court found significant has been recognized. McKinstry vs. State, (1975) 264 Ind. 29, 339 N.E.2d 636, 640; Holloway, supra, at 526. The fact that malice may be implied from an international killing, Strickland vs. State, (1977), ___, Ind.___, 359, N.E.2d 244; Cambron vs. State, (1975), 262 Ind. 660, 322 N.E.2d 712; Butler vs. State, (1967), 249 Ind. 129, 195 N.E.2d 91, unless negated by proof of sudden heat (or other defenses such as self-defense) effectively requires the defendant to prove that the killing occurred in a sudden heat in order to reduce the crime from murder to

manslaughter. Thus, the constitutional dificiencies the Mullaney Court found in Maine's law are alos present in Indiana. In addition, Indiana's law may not be distinguisehd from Maine's on the basis of technical variances, for as the Mullaney Court stated: "Winship is concerned with substance rather than . . . formalism. The rationale of that case requires an analysis that looks to the operation and effect of the law as applied and enforced by the state . . . and to the interest of both the state and the defendant as affected by the allocation of the burden of proof." Mullaney, supra, at 699 (citations omitted). Therefore, if sudden heat is an affirmative defense or mitigating factor rather than an element of voluntary manslaughter, Indiana practice unconstitutionally shifts the burden of its proof to the defendant. Such shifting constitutes reversible error as the Indiana Supreme Court stated:

> Any instruction . . . which would in any manner place the burden upon the appellant to prove his innocense, or force him to introduce evidence to create a reasonable doubt in the minds of the jurors, is erroneous. It is the affirmative duty of the State in criminal cases to prove the defendant's guilty beyond a reasonable doubt, and this burden cannot be

> shifted at any time to the defendant. Arthur vs. State, (1949) 227, Ind. 493, 86 N.E.2d 698, 7001 See Also, Underwood vs. State, (1977), ___Ind. App.___. 367 N.E.2d 848, 854.

Petitioner admits that the above argument regarding the shifting of the burden of proof was not raised at trial, however, it is petitioner's contention that this is a proper case for application of the fundamental error doctrine, and it was raised on appeal. The fundamental error doctrine permits the reviewing Court to consider improperly raised errors if it is found that such error was so prejudicial to the appellant's rights that he could not have had a fair trial. Winston vs. State, (1975), ___Ind. App.___, 332 N.E.2d 229, 331. In Underwood vs. State, (1977), ___Ind. App.___, 367 N.E.2d 4, the Court invoked the fundamental error doctrine in holding that it was reversible error, even absent objection, for the trial Court to give a jury instruction which purported to shift the burdern of proof to defendant. The Underwood Court held that the shifting of the burden of proof substantially prejudiced the defendant's right to a fair trial since "fundamental

due process of law does not permit this burden to be shifted to the defendant." Id. at 5. The error complained of in the present case is substantially the same as that raised in Underwood.

In summary, the words "sudden heat" contained in Indiana's voluntary manslaughter statute, are presumed to have some meaning. Evansville - Vanderburgh County Department of Health vs. Evansville Printing Corp., (1975), ___Ind. App.___, 323 N.E. 829, 1957, Op. Atty, Gen. 69. It now seems clear that sudden heat not an essential element of the crime, but rather an affirmative defense or mitigating factor, as the statute is being interpreted by Indiana Courts, which reduces a murder charge to manslaughter.

The Indiana Appellate Court in its opinion (Appendix A) did not deal with this issue directly and further did not give the attention the Petitioner contends it deserves. Simply stating that, (Memorandum Decision p. 6) "in reviewing the record and the applicable Indiana law, we conclude that fundamental error did not occur since Indiana law did not deprive Stemper of due process." The Court cited Patterson vs. New York, (1977) 432

U.S. 197 and Neff vs. State, (1978) 379 N.E.2d 473. The reliance on Patterson is totally erroneous in that this Court in Patterson said there was no constitutional infirmity of New York's statutory scheme since the affirmative defense of "emotional distress" does not serve to negative any elements of the crime of murder the State is to prove. Patterson, supra at 2325. What wasn't present in Patterson is present in Indiana. The Court further cites Neff vs. State, (1978) 379 N.E.2d 473, which stands for the very proposition that the petitioner is complaining of; that sudden heat is not and element to be proved beyond a reasonable doubt but a mitigating factor to apparently be proved by the defendant to negate the element of malice in a murder charge. The process is unquestionably the functional equivalent of Mullaney, supra. The new Indiana manslaughter statute effective October, 1977, does not seem to solve the problem of the void (Appendix D).

The petitioner's argument can be simply stated as follows: a defendant that is charged with murder in either degree in the State of Indiana if he wishes

to have the crime reduced to voluntary manslaughter, must produce evidence of sudden heat. That is, if the State of Indiana, through the Prosecutor's Office, has charged a defendant in a trial with murder, there is only one person in that Courtroom who is going to be presenting evidence regarding sudden heat, and that is the defendant, in order to reduce murder to manslaughter. Since recent Indiana cases herein in effect, state that sudden heat is merely a mitigation to malice and that malice can be presumed from an intentional killing, the result is to require the defendant to negate an essential element of murder, to-wit: malice, thus, freeing the State from the necessity of proving malice or sudden heat beyond a reasonable doubt.

Since sudden heat simply serves to negate malice thereby reducing to manslaughter, there has been an unconstitutional shifting of the burden of proof in that the defendant is forced to introduce evidence in an attempt to create reasonable doubt in the jurors' minds, i.e. negate the malice implied from an intentional killing. Under either construction of the words, "sudden heat" reversible error has

occurred and a Writ of Certiorari should be granted.

CONCLUSION

For the above state reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Indiana and the Indiana Supreme Court denying the petitioner to transfer. The petitioner urges this Court that Indiana, with the opinion rendered in petitioner's case has placed itself in a void somewhere between the principles of Patterson and Mullaney and only a granting of this petition can clear this void.

Respectfully submitted,

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APPENDIX A

IN THE

COURT OF APPEALS OF INDIANA

FOURTH DISTRICT

CHARLES JOSEPH STEMPER, Defendant	)	
-v-	)	No. 3-378 A 68
STATE OF INDIANA, Plaintiff	)	Dated July 16, 1979

APPEAL FROM THE LAKE SUPERIOR COURT,

CRIMINAL DIVISION

The Honorable James Kimbrough, Judge

MEMORANDUM DECISION

CHIPMAN, P.J.

As it applies to this Petitioner, the opinion below is set out verbatim as follows:

Unconstitutional Shifting of Burden of Proof

Stemper asserts, alternatively, that the verdict is contrary to law because the burden of proving sudden heat was shifted to him. He contends that such a shifting of the burden of proof was found in Mullaney v Wilbur, (1975) 421 U.S. 684 to be unconstitutional.

Stemper admits that this allegation of error was not properly preserved for appeal. It is his contention, however, that this is a proper case for application of the fundamental error doctrine. We invoke the doctrine of fundamental error only when a blatant error has occurred which would deny a defendant fundamental due process. Phillips v State, (1978) Ind., 376 N.E.2d 1143; Williams v State, (1978) Ind., 383 N.E.2d 416. In reviewing the record and the applicable Indiana law, we conclude that fundamental error did not occur since Indiana's law did not deprive Stemper of due process.

Unlike the Maine law in Mullaney which required a defendant charged with murder to prove by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter,

> Indiana law does not have a conclusive presumption of malice after certain basic facts are shown. Rather Indiana law permits an inference of malice to arise from the proof of certain basic facts. The inference

is rebuttable, and the prosecution still has the ultimate burden of persuasion on the issue.
(emphasis added)

Neff v State, (1978) Ind. App., 379 N.E.2d

Because no conclusive presumption was created and the State still had the burden of proving every element of the offense beyond a reasonable doubt, the Indiana law did not unconstitutionally shift the burden of proof to Stemper. See Patterson v New York, (1977) 432 U.S. 197.

We affirm.

Miller and Young, JJ. concur.

APPENDIX B

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
BILLIE R McCULLOUGH, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 633-5200

No. 3-373A68

State of Indiana

Charles Stemper

You are hereby notified that the Court of Appeals

has on this day Denied Appellant's Petition for Rehearing. Robertson,A.C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court,

this 13th day of August, 1979

Billie R McCullough
Clerk Supreme Court and Court of Appeals

APPENDIX C

NOV 05 RECD

STATE of INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 633-5700

No. 3-373A60

Charles Joseph Stamper V. State of Indiana

You are hereby notified that the Supreme Court

has on this day Appellants Petition to Transfer is hereby Denied. Givan,C.J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 2nd day of Nov. 197 9

Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

APPENDIX D

Ind. Code 35-1-54-1 (1969) Murder - Second Degree --

Whoever purposely and maliciously, but without premeditation, kills any human being, is guilty of murder in the second degree, and, on conviction, shall be imprisoned in the state prison during life, or shall be imprisoned in the state prison not less than fifteen (15) nor more than twenty-five (25) years.

Ind. Code 35-13-4-2 (1969) Manslaughter - Voluntary Manslaughter.

Whoever voluntarily kills any human being without malice, expressed or implied, in a sudden heat, is guilty of voluntary manslaughter, and, on conviction, shall be imprisoned in the state prison for not less than two (2) nor more than twenty-one (21) years.

Ind. Code 35-42-1-3 Voluntary Manslaughter.

(a) A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter, class B felony.

(b) The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under section 1 (1) [35-42-1-1(1)] of this chapter to voluntary manslaughter. [IC 35-42-1-3, as added by Acts 1976, P.L. 148, § 2, p. 718; 1977, P.L. 340, § 27, p. 1533.] (Indianas present statute effective after conviction here in)

APPENDIX E

Me. Rev. Stat. Ann., Title 17, §2651 (1964):

Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.

Me. Rev. Stat. Ann., Title 17, §2551 (1964):

Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years . . .

APPENDIX F

AMENDMENT V

CAPITAL CRIMES: DOUBLE JEOPARDY: SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jorpardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

LAWRENCE R. NEFF v. STATE OF INDIANA

THE COURT OF APPEALS OF INDIANA

THIRD DISTRICT

No. 3-1276 A292

August 14, 1978

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT

HON. JOHN W. MONTGOMERY, JUDGE

SYNOPSIS: An appeal from a jury conviction of voluntary manslaughter. The defendant contended that the evidence was insufficient, that the court erred in overruling his motion for judgment on the evidence and erred in modifying a tendered instruction.

The Court of Appeals of Indiana, Third District, Hoffman, Judge, affirmed the judgment. The trial court did not have to show provocation in order to convict defendant of voluntary manslaughter, thus the evidence was sufficient. The Court rejected the other contentions.

EVIDENCE – Sanity. Lay testimony on the issue of sanity is proper and may be credited over that of expert witnesses. p. 25.

CRIMINAL LAW – Malice. Malice may be implied from the intentional use of a deadly weapon in a manner likely to cause death or great bodily injury. p. 28.

CRIMINAL LAW – Purposeful Killing. Once a purposeful killing is shown the offense is either murder, manslaughter, or no crime at al. p. 30.

VOLUNTARY MANSLAUGHTER – *Mens Rea*. The *mens rea* for voluntary manslaughter can be proved by evidence that the killing was not justified or excused. p. 30.

APPEARANCES: Jeanne J. Swartz, South Bend, Indiana, for the Appellant.

Theodore L. Sendak, Attorney General of Indiana, Wesley T. Wilson, Deputy Attorney General for the Appellee.

HOFFMAN, J.

Defendant-appellant Lawrence R. Neff was convicted following a trial to the jury of the offense of voluntary manslaughter and sentenced to the custody of the Indiana Department of Correction for a period of not less than two nor more than 21 years.

Appellant contains on appeal that the trial court erred in overruling his motion for judgment on the evidence, that the evidence is insufficient to support the finding that appellant was sane at the time of the offense was committed, that there was in-

sufficient evidence of a sudden heat of passion induced by adequate provocation, and that the trial court erred in modifying a tendered instruction.

The record discloses that on May 4, 1967, appellant was indicted for second-degree murder in the beating death of his stepdaughter, Alice Marie Neff. Subsequently, two disinterested physicians were appointed to determine appellant's sanity. After the physicians submitted their reports, a hearing was held which led to a finding that appellant was "unable to comprehend with sufficient understanding the nature of the criminal action against him, the proceedings thereon and to make a proper defense for himself." Accordingly, the trial court ordered appellant committed to the Maximum Security Division of the Dr. Norman Beatty Memorial Hospital.

On February 16, 1972, the acting superintendent of Norman Beatty Hospital reported that appellant was then able to stand trial. Thereafter the trial court granted the prosecuting attorney's motion to return appellant for trial.

On April 21, 1972, appellant entered a plea of guilty to the lesser included offense of voluntary manslaughter and was sentenced to imprisonment for two to 21 years. On October 3, 1975, the trial court granted appellant's amended petition for post-conviction relief and allowed appellant to withdraw his plea of guilty. Appellant then entered a plea of not guilty to the offense of voluntary manslaughter on October 17, 1975. Later the trial court rejected a plea agreement whereby appellant would plead guilty to involuntary manslaughter and, having served the maximum penalty imposed for such offense, would be released from custody.

On April 26, 1976, appellant filed a plea of not guilty by reason of insanity and the court subsequently appointed two disinterested physicians to examine the appellant and testify at trial. Following trial, the jury found appellant guilty as charged and further found that appellant was sane at the time of the commission of the offense.

Appellant first contends that the trial court erred in overruling his motion for judgment on the evidence made at the close of the State's evidence. After the trial court denied his motion, appellant called Robert Seals as a witness in his case-in-chief. Such introduction of evidence by appellant after the overruling of his motion for judgment on the evidence constitutes a waiver of any error in the overruling of such motion. *Downs v. State* (1977), ___ Ind. ___ [60 Ind.Dec. 182], 369 N.E.2d 1079; *Parker v. State* (1976), ___ Ind. ___ [55 Ind.Dec. 547], 358 N.E.2d 110.

Appellant's challenge to the sufficiency of the evidence is focused upon two distinct points: (1) whether there was sufficient evidence as to appellant's sanity at the time the offense was committed; and (2) whether there was evidence of a sudden heat of passion induced by adequate provocation.

With regard to the sufficiency of evidence to support the finding of sanity, Dr. Frank Hogle testified that in his opinion appellant was unable to conform his conduct to the requirements of the law. Dr. Glenn Harris was unable to form an opinion as to appellant's sanity. Appellant concedes that expert testimony is not conclusive upon the issue of a criminal defendant's sanity. *Stamper v. State* (1973), 260 Ind. 211 [36 Ind.Dec. 82], 294 N.E.2d 609; *Fitch v. State* (1974), ___ Ind.App. ___ [42 Ind.Dec. 682], 313 N.E.2d 548. Lay testimony on the issue of sanity is proper and may be credited over that of expert witnesses. *Wilson v. State* (1975), ___ Ind. ___ [48 Ind.Dec. 663], 333 N.E.2d 755; *Blake v. State* (1975), ___ Ind. ___ [45 Ind.Dec. 616], 323 N.E.2d 227; *Richardson v. State* (1976), ___ Ind.App. ___ [54 Ind.Dec. 50], 351 N.E.2d 904; *Fitch v. State, supra.* Appellant states that "the only evidence of any probative value from which the jury could reasonably infer sanity is the testimony of the officers." Appellant does not attempt to demonstrate any inadequacy in the police officers' testimony which would render it insufficient to support a guilty verdict, but merely points to other evidence from which the jury could infer that appellant was insane. Such an argument does no more than ask this Court to weigh the evidence. This we cannot do.

Appellant further contends that the evidence is insufficient to show a sudden heat of passion induced by adequate provocation.

The evidence most favorable to the State discloses that on the evening of February 3, 1967, Alice Marie Neff came home from school and told appellant she had received some clothes from her teacher. Appellant got angry and stated he did not want charity from anyone. Appellant then accused Alice of lying and of seeing her grandparents instead. Alice insisted she got the clothes from the teacher. Appellant started hitting Alice and then made a "cat-o-nine tails" from electric wire and began whipping her. Appellant then picked Alice up by her feet, dropping her head against the floor approximately eight or nine times. Appellant warned his wife not to interfere or he would also beat her.

Mrs. Neff filled the sink with water preparing to give Alice a bath. Appellant picked Alice up and submerged her head in the water saying he was going to drown her. Mrs. Neff interposed, stating she wanted to give Alice a bath. Appellant replied, "Well, after you give her a bath I want you to drown her." As Mrs. Neff

was taking Alice from the water, appellant seized her and held her head underneath the faucet.

Afterwards, appellant grabbed Alice around the waist and butted her head against and through the dining room wall and then against and through the bathroom wall. When Mrs. Neff tried to stop appellant, he again warned her not to interfere or she would get the same thing.

Later that evening, appellant was downstairs to check the furnace. Alice started to follow, Mrs. Neff called to her to return, but Alice stated, "I want to go down with daddy." Alice descended to about the second or third step and slipped and fell. Appellant picked her up and carried her upstairs to the living room whereupon he started asking her questions again and accused her of lying to him. Appellant started beating her again with the "cat-o-nine tails." Mrs. Neff stepped in, but appellant picked up a bat and threatened to kill Mrs. Neff if she intereferred again.

Appellant told Mrs. Neff to go to the grocery store. When she returned, Alice was lying on the bed. Mrs. Neff sat on the bed with her and asked what happened. Appellant said, "Never mind what happened. Go call the doctor."

Thereafter, Alice was taken to the hospitals by ambulance. At the time of her admission to the hospital, Alice was in an unconscious state and vomiting. She had "bruises all over the side of the head, over the chin, over the face and bruises all over the arms and legs and the backend of the buttocks." She was in a state of deceraba in which the center portion of the brain is so damaged that it does not work correctly and the patient gets very rigid in the arms, legs, and body, and the neck is pulled back. Alice died on the morning of February 7, 1967, as a result of severe brain damage.

Mrs. Neff testified that appellant was drinking both whiskey and wine on the evening of February 3, 1967.

Appellant contends that the evidence is insufficient to support the verdict of voluntary manslaughter because there was no evidence of a sudden heat of passion engendered by adequate provocation. The essence of appellant's argument is that there is no evidence that Alice Marie Neff did anything to provoke appellant, mere words alone being insufficient. However, such an argument confuses the sudden heat requirement as it applies to the offense of voluntary manslaughter and as it relates to the requirement of malice on the murder offenses.

Perhaps this feature of voluntary manslaughter can best be understood by an examination of the law of homicide as it existed

at common law. The English common law began its analysis of homicide cases with a determination of whether the homicide had been committed with malice aforethought. If this was found lacking, the analysis then shifted to the other end of the spectrum for a determination of whether there was any justification or excuse. Manslaughter was a catch-all category lying between the more serious crime of murder and the noncriminal homicides occurring under circumstances of justification or excuse. R. Perkins, *Criminal Law*, at 51 (2d Ed. 1969).

The homicide offenses are defined by statute in Indiana but still retain many of the concepts found at common law. First-degree murder is defined as the killing of a human being purposely and with premeditated malice. IC 1971, 35-13-4-1 (Burns Code Ed.).[1] If there is no premeditation, and the killing is done "purposely and maliciously" the offense is seond-degree murder. IC 1971, 35-1-54-1 (Burns Code Ed.).[2] Malice is a necessary element of both degrees of murder and has been defined as follows:

> "On the one hand, malice may be defined in a positive fashion. Blackstone defined malice, which even then distinguished murder from other homicides, as 'any evil design in general; the dictate of a wicked, depraved and malignant heart.' 4 W. Blackstone, *Commentaries* * 198. Several Indiana cases have adopted versions of this definition: *Blackburn v. State* (1973), 260 Ind. 5 [34 Ind.Dec. 684], 291 N.E.2d 686; *Helms v. State* (1968), 251 Ind. 335 [15 Ind.Dec. 580], 241 N.E.2d 244; *Brown v. State* (1934), 206 Ind. 223, 189 N.E. 133; *Harris v. State* (1900), 155 Ind. 265, 58 N.E. 75; *Davidson v. State* (1893), 135 Ind. 254, 34 N.E. 972.
>
> "On the other hand, malice may also be defined in a negative fashion. It is that state of mind which exists when one purposely kills another not in the heat of passion induced by sufficient provocation, e.g. *Willaims (sic) v. State* (1925), 196 Ind. 84, 93, 147 N.E. 153, not excused, as when acting in self defense, e.g. *Taylor v. State* (1929), 201 Ind. 241, 167 N.E. 133, and not justified, as when killing in military combat. R. M. Perkins, A Rationale of Mens Rea, 52 Harv.L.Rev. 905, 915-17 (1939); R. M. Perkins, A Re-Examination of Malice Aforethought, 43 Yale L.J. 537, 567-70 (1934); 4 W. Blackstone, Commentaries * 201."

[1]The statute also defines several other homicides which are first-degree murder. However, those other definitions are not relevant to this discussion. IC 1971, 35-13-4-1 (Burns Code Ed.), was repealed, effective October 1, 1977, by Acts 1976, P.L. 148, § 24. IC 1971, 35-42-1-1 (1977 Burns Supp.), defines the offense of murder as follows:

> "A person who: (1) Knowingly or intentionally kills another human being; or (2) Kills another human begin (sic) while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery; commits murder, a felony."

[2]This statute was repealed by Acts 1976, P.L. 148, § 24, effective October 1, 1977.

McKinstry v. State (1975), ____ Ind. ____, at ____ [50 Ind.Dec. 182 at 187], 338 N.E.2d 636, at 640.

This latter definition demonstrates the relationship between the mental elements involved in the various homicide offenses. This relationship was explained by our Supreme Court in *Dennison v. The State* (1859), 13 Ind. 510, at 511-512, as follows:

> "If a sane man, without accident, justification, or any provocation, suddenly kill another, even a stranger, the act must be attributed to malice, because it could be accounted for upon no other hypothesis, based upon the laws governing the action of the mental and moral faculties of man. Such an act would evince a degree of depravity of heart, almost excluding the possibility of any higher moral feeling than malice against all mankind. But human experience will bear witness that provocation may excite a transport of passion, accompanied by a momentary intention to kill the dearest and most beloved friend, against whom no malice exists. And passion, upon sufficient provocation, tends to rebut the presumption of malice."

Malice may be inferred from facts which disclose that a homicide resulted from an intentional act. *Gordy v. State* (1974), 262 Ind. 275 [43 Ind.Dec. 204], 315 N.E.2d 362; *Butler v. State* (1967), 249 Ind. 484 [11 Ind.Dec. 124], 229 N.E.2d 471; *See: Welty v. State* (1912), 180 Ind. 411, 100 N.E. 73; *Ex parte Moore* (1868), 30 Ind. 197.

Thus malice may be implied from the intentional use of a deadly weapon in a manner reasonably calculated to cause death or great bodily injury, *Sypniewski v. State* (1977), ____ Ind. ____ [59 Ind.Dec. 602], 368 N.E.2d 1359; *Shutt v. State* (1977), ____ Ind. ____ [59 Ind.Dec. 355], 367 N.E.2d 1376; *Strickland v. State* (1977), ____ Ind. ____ [56 Ind.Dec. 98], 359 N.E.2d 244; or from any deliberate or cruel act by one person against another. *Covington v. State* (1975), 262 Ind. 636 [45 Ind.Dec. 576], 322 N.E.2d 705; *Corbin v. State* (1968), 250 Ind. 147 [13 Ind.Dec. 208], 237 N.E.2d 376; *Wahl v. State* (1951), 229 Ind. 521, 98 N.E.2d 671.

The inference of malice thus arising is valid and can alone support a verdict. *Shutt v. State, supra.* However, the inference of malice may be rebutted by evidence that the killing was the result of a sudden heat of passion induced by sufficient provocation. *Lawson v. State* (1978), ____ Ind. ____ [61 Ind.Dec. 278], 373

N.E.2d 128; *Shutt v. State, supra; Gordy v. State, supra; See: Welty v. State, supra; Ex parte Moore, supra.*

In such instances, the offense is reduced from murder to manslaughter. *Love v. State* (1977), ____ Ind. ____ [60 Ind.Dec. 79], 369 N.E.2d 1073; *Dickens v. State* (1973), 260 Ind. 284 [36 Ind.Dec. 275], 295 N.E.2d 613; *Yarber v. State* (1962), 242 Ind. 616, 179 N.E.2d 882. This mitigation of the degree or grade of homicide is referred to as the rule of provocation. In *Dickens v. State, supra*, 260 Ind. at 293 [36 Ind.Dec. at 281], 295 N.E.2d at 618, our Supreme Court stated the rule of provocation, as follows:

> "(A)ll that is required to reduce a homicide from murder to voluntary manslaughter is sufficient provocation to excite in the mind of the defendant such emotions as either anger, rage, sudden resentment, or terror as may be sufficient to obscure the reason of an ordinary man, and to prevent deliberation and premeditation, to exclude malice, and to render the defendant incapable of cool reflection."

Voluntary manslaughter is therefore defined as the voluntary[3] killing of a human being without malice in a sudden heat. IC 1971, 35-13-4-2, *supra*.[4] Killing "without malice in a sudden heat" is the element which distinguishes voluntary manslaughter from murder. *Love v. State, supra; Dickens v. State, supra.* As stated by our Supreme Court in *Hasenfuss v. State* (1901), 156 Ind. 246, at 249, 59 N.E. 463, at 465:

> "Voluntary manslaughter possesses the common element of murder in both its degrees—the intention to kill—but it is distinguished from these crimes by an absence of malice, and, of course, premeditation. The statute might be thus paraphrased without doing violence to its meaning: Voluntary manslaughter is an unlawful, intentional killing of a human being, without malice and without premeditation. Although the statute adds 'upon a sudden heat,' it is only in the application of the definition to a given case that this element must be made use of, for there could be no such thing as an unlawful

[3]A "voluntary" killing is one done by the free exercise of the will, done by design, purposely. *Murphy v. The State* (1869), 31 Ind. 511. *See also: Ketring v. State* (1936), 209 Ind. 618, 200 N.E. 212.

[4]This statute was repealed by Acts 1976, P.L. 148, § 24, effective October 1, 1977. The new Penal Code defines voluntary manslaughter as follows:

> "(a) A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter, a class B felony.
>
> "(b) The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under section 1 (1) (35-42-1-1(1) of this chapter to voluntary manslaughter." IC 1971, 35-42-1-3 (1977 Burns Supp.).

> intentional killing without malice, unless it was done upon a sudden heat. This mitigating fact reduces the crime to manslaughter, if upon the whole evidence it appears sufficient to rebut the presumption of malice arising from a voluntary killing."

"Sudden heat" serves to negate the inference of malice and is not itself an indicia of culpability except insofar as it connotes a state of mind which would not disclose circumstances constituting justification or excuse.

In the case at bar, appellant was charged with the offense of voluntary manslaughter. His argument is based upon a lack of provocation sufficient to engender a sudden heat of passion. However, the rule of provocation is a rule which evolved as a factor of mitigation so as to reduce a homicide from murder to manslaughter.

The facts in the case at bar clearly point out the anomaly of applying the rule of provocation when voluntary manslaughter is the offense charged. In such a case, the charge of voluntary manslaughter itself provides the mitigation. Thus, when voluntary manslaughter is the offense charged in the indictment or information and becomes the final pleading upon which the case is tried, the charging vehicle should be construed as a judicial admission that the mitigating factor of sudden heat exists and is sufficient to negate the inference of malice. As demonstrated by the definition of malice delineated in *McKinstry v. State, supra*, ____ Ind. ____ [50 Ind.Dec. 182], 338 N.E.2d 636, once a purposeful killing is shown, the offense is either murder, manslaughter, or no crime at all. The *McKinstry* equation can be changed to focus upon the element of sudden heat. The *mens rea* for voluntary manslaughter can thus be defined as the state of mind that exists when he purposely kills another without malice and not under circumstances of justification or excuse. As stated in *Hasenfuss v. State, supra*, there is no such thing as an unlawful intentional killing without malice, unless done upon a sudden heat. The charge of voluntary manslaughter prevents the State from showing malice, and thus satisfies that portion of the equation. In other words, the judicial admission precludes the State from proving second-degree murder. The *mens rea* for voluntary manslaughter can then be proved by evidence that the killing was not justified or excused.

This does not violate the due process considerations found in *Mullaney v. Wilbur* (1975), 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508. That decision concerned a Maine law which required a defendant charged with murder to prove by a preponderance of the evidence that he acted "in the heat of passion on sudden provoca-

tion" in order to reduce the homicide to manslaughter. If the homicide was both intentional and unlawful, the Maine law of homicide conclusively presumed malice aforethought unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. The Supreme Court held that placing on the defendant the burden of proving the critical factor in dispute—the presence or absence of the heat of passion on sudden provocation—violates due process.

The case at bar is distinguishable from *Mullaney* in several respects. Indiana law does not have a conclusive presumption of malice after certain basic facts are shown. Rather Indiana law permits an inference of malice to arise from the proof of certain basic facts. The inference is rebuttable, and the prosecution still has the ultimate burden of persuasion on the issue. The case at bar does not shift the burden of persuasion from the State to the appellant, but rather places the rule of provocation in its proper perspective when voluntary manslaughter is the offense charged. The State concedes that the more serious state of mind necessary for murder does not exist. What the State must then prove is that there was a purposeful homicide which was committed without circumstances of justfication or excuse, and it must prove this beyond a reasonable doubt. And, as was stated in *Mullaney*, such may be shown by adducing evidence of the factual circumstances surrounding the commission of the homicide.

In the case at bar, there was sufficient evidence that appellant voluntarily killed another human being. There was evidence of anger and sudden resentment of appellant against the deceased. There was no evidence that the homicide was legally justified or excused. The State conceded there was no malice. Consequently, the jury could reasonably infer that the offense was committed "without malice in a sudden heat."

Appellant next contends that the trial court erred in modifying his tendered instruction by striking therefrom the sentence "(w)ords only cannot constitute sufficient provocation." However, since the rule of provocation was not properly an issue in the case at bar, there was no error in so modifying the instruction.

No reversible error having been shown the judgment of the trial court must be affirmed.

Judgment affirmed.

Robertson, J., participating by designation, concurs.

Staton, J. concurs in result.

Supreme Court, U. S.
FILED
FEB 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

January Term, 1980

No. 79-1173

CHARLES JOSEPH STEMPER,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

Supreme Court of the United States

January Term, 1980

No. 79-1173

CHARLES JOSEPH STEMPER, *Petitioner,*

v.

STATE OF INDIANA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Supreme Court of Indiana, thereby refusing to review the decision entered by the Indiana Court of Appeals in Cause No. 3-378A68 on July 16, 1979.

OPINION BELOW

The Indiana Court of Appeals for the Fourth District entered a memorandum decision in this cause (not for publication) on July 16, 1979. This decision may be found in Respondent's Appendix. Rehearing was denied by the Indiana Court of Appeals on August 13, 1979, and

transfer was denied by the Indiana Supreme Court on November 2, 1979.

STATEMENT OF THE CASE

Petitioner, Charles Joseph Stemper, was indicted by a grand jury on the charge of murder in the first degree for the death of Timothy Luna on November 24, 1976. Petitioner's trial by jury began on September 20, 1977, with the trial judge, on September 22, 1975, directing a verdict for the Petitioner on the charge of first degree murder On September 23, 1977, the jury found Petitioner guilty of voluntary manslaughter. On October 7, 1977, Petitioner was sentenced to a term of imprisonment of not less than two nor more than twenty-one years.

Petitioner appealed his conviction, and on July 16, 1979, the Indiana Court of Appeals for the Fourth District, in a memorandum decision, not for publication, affirmed Petitioner's conviction. Stemper's petition for rehearing was denied on August 13, 1979 (Petitioner's Appendix B), and his petition for transfer was denied by the Indiana Supreme Court on November 2, 1979 (Petitioner's Appendix C.).

STATEMENT OF THE FACTS

The evidence presented at Petitioner's jury trial established that on November 24, 1976, Sandra Luna left her infant son in the care of Petitioner while she visited her sister. Upon her return, Petitioner was leaving the home and indicated to her that Timothy needed her. Sandra foun Timothy dead or dying and was unable to revive him. The infant was pronounced dead on arrival at a local hospital.

Witnesses testified that the child's body had a number of old and new bruises on it and that the cause of death

was a broken neck. Witnesses also testified that Petitioner had been hurting the child just prior to the discovery of the body and that Petitioner had mistreated and injured the child on other occasions. Petitioner's own statement to the police indicated he had hit the child in a meaningful manner.

REASONS FOR DISALLOWANCE OF THE WRIT

A. Independent State Ground

Petitioner asserts the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). Respondent contends that this Court is without jurisdiction over this cause as the opinion of the Indiana court of Appeals was based upon an adequate independent foundation of state substantive law and not necessarily upon the consideration of a federal question.

With respect to the issue raised by Petitioner in this Court, it can be readily observed—both in the petition, p.4, and that portion of the opinion of the Indiana Court of Appeals presented in Petitioner's Appendix A, p. 17—that Petition did not, pursuant to Indiana law, properly preserve the alleged error for review by the Indiana appellate courts. Petitioner raised his claim of unconstitutional shifting of burden of proof for the first time in his Brief of Appellant before the Indiana Court of Appeals.

Indiana Rules of Criminal Procedure, Rule 16, and Indiana Rules of Trial Procedure, Rule 59, require that alleged errors first be raised in a motion to correct errors in the trial court. Failure to adhere to these rules results in the waiver of the alleged error for purposes of appellate court review. *Murphy v. State,* 267 Ind. 184, 369 N.E.2d 411, 413 (1977). In addition, Indiana law requires that a party object to alleged errors in a timely and specific manner at trial. *Ballard v. State,* 262 Ind. 482, 318 N.E.2d 798,

807 (1974); *Gutierrez v. State,* — Ind. —, 395 N.E.2d 218, 222 (1979).

Petitioner's failure to adhere to the relevant Indiana procedural requirements regarding the raising of issues for appellate review was, alone, a sufficient ground for the Indiana Court of Appeals to deny Petitioner's claim of error. Therefore, a sufficient state ground exists, independent of any federal question, to sustain Petitioner's conviction. *See, Parker v. North Carolina,* 397 U.S. 790, 798 (1970); *Wainwright v. Sykes,* 433 U.S. 72 (1977). Thus, this petition should be denied.

B. Indiana Law Does Not Shift Burden to Defendant

Furthermore, Petitioner's reliance upon *Mullaney v. Wilbur,* 421 U.S. 684 (1975) is misplaced. Unlike the Maine law involved in *Mullaney,* Indiana law does not require a defendant to prove anything in order to reduce a conviction from murder to manslaughter. Indiana Courts have long held that manslaughter is a lesser included offense of murder and that a jury may return a verdict of guilty of voluntary manslaughter notwithstanding the absence of proof of sudden heat. *McDonald v. State,* 264 Ind. 477, 346 N.E.2d 569 (1976); *Holloway v. State,* — Ind. App. —, 352 N.E.2d 523 (1976). The Court of Appeals has recently considered the elements of voluntary manslaughter, under the new Indiana Penal Code, and has concluded that, as under the old code, "sudden heat" is not an element of the crime of manslaughter. The Indiana Court of Appeals, in *Wallace v. State,* — Ind. App. —, 395 N.E.2d 274 (1979) stated, at 395 N.E.2d 276:

> We now hold that both murder and voluntary manslaughter can be proved by evidence of the knowing or intentional killing of another human being. Because the two offenses can be established by the same material elements, voluntary manslaughter is a lesser included offense of murder.
>
> • • •
>
> The evidence was sufficient for the jury to have returned a verdict of guilty to the charge of murder; the jury, therefore could also return a verdict of guilty of voluntary manslaughter, notwithstanding the lack of proof of sudden heat.

Clearly, under Indiana law the burden is on the State to prove the elements of both murder and voluntary manslaughter. "Sudden heat" is not an element of voluntary manslaughter. *Holloway, supra.* However, in order for a defendant to be convicted of murder in Indiana, it is necessary for the State to prove malice and premeditation (absence of "sudden heat") beyond a reasonable doubt. Indiana does not place a burden on the defendant to negate the intent required for a murder conviction, for the State must demonstrate the requisite elements for murder. *Lemay v. State,* 244 Ind. 652, 190 N.E.2d 189, 191 (1963).

Thus, Indiana law comports with the dictates of *Mullaney, supra,* wherein this Court held, at 421 U.S. 704:

> We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.

Furthermore, this Court's opinion in *Patterson v. New York,* 432 U.S. 197 (1977), would indicate that Petitioner's claim that "sudden heat" is a mitigating factor under Indiana law, which Petitioner finds offensive, does not render the Indiana law in violation of due process. The Court stated, at 432 U.S. 210:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interest against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements in the definition of the offense of which the defendant is charged. *Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.* (emphasis added).

Thus, it would appear that even if Indiana did require the accused to present evidence of sudden heat in order to mitigate a murder charge, such would not violate any constitutional requirements.

C. Standing

Finally, Respondent, State of Indiana, asserts that Petitioner's claim for relief must fail for the additional reason that Petitioner has not been prejudiced by the alleged constitutional error upon which he bases this petition. Petitioner argues that the Indiana law falls within the proscription of *Mullaney, supra,* and that a decision is needed by this Court to determine if the Indiana law falls within *Mullaney* or *Patterson, supra.* This is Petitioner's claim of a substantial federal question. However, the facts in this case clearly distinguish this cause from the federal question raised in either *Mullaney* or *Patterson.*

The federal question considered in *Mullaney, supra* and *Patterson, supra,* and which Petitioner attempts to raise here involved the shifting of the burden of proof to the defendants. In *Mullaney* and *Patterson,* the defendants were convicted of murder and complained that the state had shifted the burden of persuasion to them in order to establish manslaughter. Clearly, if the State in those cases had unconstitutionally shifted the burden to the defendant, these defendants could assert a real harm—the fact that they had been convicted of murder rather than manslaughter.

Unlike the defendants in *Mullaney* and *Patterson,* Petitioner was *not* convicted of murder, but rather, the trial judge directed a verdict for Petitioner on the first degree murder charge and Petitioner was convicted by a jury only of voluntary manslaughter. Thus, Petitioner's entire argument has no relevance whatsoever to his factual situation. Even assuming *arguendo* that Indiana did unconstitutionally shift the burden to Petitioner as claimed, Petitioner has in fact suffered no harm for he has obtained the relief he now seeks—the opportunity to be convicted of manslaughter rather than murder. Petitioner, who was not convicted of murder, does not have standing to assert that Indiana law unconstitutionally requires a defendant to shoulder the burden of presenting evidence in order to reduce a murder charge to manslaughter. In effect, Petitioner is asserting the rights of parties not involved in this action. Thus, Petitioner lacks standing to raise the issue he argued. *Broadrick v. Oklahoma,* 413 U.S. 601 (1973); *County Court of Ulster County, New York v. Allen,* 99 S.Ct. 2213 (1979).

It is the State's position, therefore, that a writ of certiorari is inappropriate in this cause for Petitioner, based

upon the particular fact situation of this cause, has not in fact advanced a justiciable and substantial federal question for Petitioner does not have standing to raise the claimed error. Moreover, even assuming that the Indiana law is unconstitutional as Petitioner claims, the particular facts of this case clearly demonstrate that the error, if any, did not prejudice the substantial rights of Petitioner. Thus, the error, if any, was harmless beyond a reasonable doubt, with respect to Petitioner's conviction. *Chapman v. California,* 386 U.S. 18, (1967).

CONCLUSION

WHEREFORE, Respondent respectfully submits that the issue alleged by Petitioner has been adequately disposed of pursuant to State law grounds, that the issue alleged by Petitioner does not raise a substantial federal question, and that the error alleged by Petitioner has not prejudiced the substantial rights of Petitioner. Furthermore, Petitioner lacks standing to raise the error claimed. Respondent, therefore, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

CHARLES JOSEPH STEMPER,
Defendant-appellant,
v.
STATE OF INDIANA,
Plaintiff-appellee.

No. 3-378 A 68

APPEAL FROM THE LAKE SUPERIOR COURT, CRIMINAL DIVISION

The Honorable James Kimbrough, Judge

MEMORANDUM DECISION

CHIPMAN, P.J.

Charles Joseph Stemper appeals his conviction of voluntary manslaughter alleging: (1) the trial court erroneously denied his motion in limine and admitted certain photographs; (2) the trial court's denial of the motion to suppress statements made by Stemper and the admission of those statements at trial was reversible error; and (3) the jury's verdict is contrary to law because (a) sudden heat was not proven, or alternatively, (b) if sudden heat was not required to be proven, there was an unconstitutional shifting of the burden of proof.

We affirm.

I. Admission of Photographs

Photographs of the deceased child, taken at the hospital emergency room, were admitted into evidence and shown to the jury over Stemper's objection. Stemper contends the photographs were introduced in order to arouse passion and prejudice in the jurors' minds, and therefore, he asserts it was error to admit them.

Generally, the admission or exclusion of photographic evidence is within the sound discretion of the trial court, and the trial court's action therein will be disturbed only if the court abused its discretion by allowing clearly prejudicial evidence before the jury. *Gee v. State,* (1979) Ind., 389 N.E.2d 303; *Inman v. State,* (1978) Ind., 383 N.E.2d 820; *Hubble v. State,* (1973) Ind., 299 N.E.2d 612. Prejudice from the admission of photographic evidence does not occur because of the gruesome character of the photograph; rather, it arises because the photograph is not material or relevant or does not shed any light on any issue. *Landers v. State,* (1975) Ind.App., 331 N.E.2d 770.

"The relevancy of photographic evidence may be determined by an inquiry as to whether a witness would be permitted to describe verbally the objects photographed." *Crane v. State,* (1978) Ind., 380 N.E.2d 89, 92. If a photograph is shown to be a true representation of that which it purports to represent, it is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description. *Grooms v. State,* (1978) Ind., 379 N.E.2d 458; *Hawkins v. State,* (1941) Ind., 37 N.E.2d 79. Thus, a photograph may properly be used to visually display what a witness has verbally described. *Meeker v. Robinson,* (1977) Ind.App., 370 N.E.2d 392.

The record reveals testimony from numerous witnesses who were permitted, without objection, to describe the con-

dition of the infant's body, particularly the bruises and marks[1] which they observed thereon. The photographs in question were relevant as illustrative of this testimony. *Vaden v. State,* (1978) Ind., 383 N.E.2d 60. There was, therefore, no error in the admission of these photographs.

II. Admission of Statements

Oral and written statements made by Stemper to police officers were admitted into evidence over Stemper's objection. Defense counsel acknowledged that Stemper was read his rights and that he understood them; the issue is whether or not the statements were voluntarily made. We hold that they were voluntary.

The determination as to whether a confession or statement has been voluntarily given is made by viewing the totality of the circumstances in an effort to determine whether any inducements have been made in the form of threats, promises, or other improper influences. *Williams v. State,* (1979) Ind., 386 N.E.2d 670. While the State at trial bore the burden of proving the voluntariness of Stemper's statement or waiver beyond a reasonable doubt, *Lofton v. State,* (1978) Ind., 378 N.E.2d 834; *Ortiz v. State,* (1976) Ind., 356 N.E.2d 1188, on appeal we review the trial court's determination of voluntariness as we do other sufficiency matters. We do not weigh the evidence or rejudge the witnesses' credibility. We consider only that evidence which supports the decision of the trier of fact in the case of contested evidence, along with any uncontested evidence presented by the appellant. *Williams v. State,* (1979) Ind., 386 N.E.2d 670; *Wollam v. State,* (1978)

[1] The origin of marks which could not have been attributable to actions by Stemper, such as marks which were caused by the use of the resuscitation equipment, was pointed out by the witnesses' testimony so that the jury would not be mislead.

Ind., 380 N.E.2d 82. The trial court's determination will not be disturbed when the ruling is supported by substantial evidence of probative value, even though conflicting evidence on the issue of voluntariness was presented to the trial court. *Pawloski v. State,* (1978) Ind., 380 N.E.2d 1230.

Although Stemper alleged that he had been kicked, beaten, and threatened, all of the police officers named by Stemper as being involved in these activities also testified and denied any threats or unnecessary violence.[2] In light of the fact that we do not weigh conflicting evidence, we find there was sufficient evidence of probative value to support the trial court's determination that Stemper's statements were voluntarily made. *Vaden v. State,* (1978) Ind., 383 N.E.2d 60; *see also Mosley v. State,* No. 878 S 155 (Ind. S. Ct., June 25, 1979). We also note that Stemper took the stand and testified to substantially the same facts as those contained in his statements; by so testifying, he waived any theoretical error in admitting his statements. *Vaden v. State,* (1978) Ind., 383 N.E.2d 60.

III. Verdict Contrary to Law

(a) Absence of Sudden Heat

The essential elements of the crime of voluntary manslaughter are: (1) voluntary killing of a human being; (2) without malice; and (3) in sudden heat. *Green v. State,* (1967) Ind., 229 N.E.2d 726; *Nuss v. State,* (1975) Ind.App., 328 N.E.2d 747. Stemper alleges he could not have been convicted of voluntary manslaughter because

[2] The officers admitted there was some struggling between them and Stemper when Stemper was initially apprehended and transported to the police station. According to the officers, this was precipitated by Stemper's resistance. All of the officers denied any violence or threats of violence in order to induce Stemper to make a statement.

there was insufficient evidence of sudden heat. We disagree.

In addressing a similar allegation, this court in *Hopkins v. State,* (1975) Ind.App., 323 N.E.2d 232 at 239, stated:

> Historically, manslaughter has been treated as a lesser included offense of murder in this State, even after the manslaughter statute was bifurcated in 1969 to distinguish between voluntary and involuntary manslaughter. (citations omitted). The rule has been that if there is evidence which would support a conviction for murder in either degree, then the jury has the right to find a defendant guilty of voluntary (or involuntary) manslaughter *as a lesser included offense,* even in the absence of proof of 'sudden heat.' (our emphasis)

We have no power to set aside a voluntary manslaughter verdict if the evidence would have sustained a finding of guilt of the higher crime of second degree murder. After reviewing the record, we believe that the evidence is clearly sufficient to permit a jury to infer that a homicide had been committed, *Vaden v. State,* (1978) Ind., 383 N.E.2d 60; *Robinson v. State,* (1974) Ind., 317 N.E.2d 850; *Greer v. State,* (1969) Ind., 245 N.E.2d 158; therefore, the jury could properly return a verdict of guilty of voluntary manslaughter, notwithstanding the absence of proof of sudden heat. *McDonald v. State,* (1976) Ind., 346 N.E.2d 569; *Love v. State,* (1978) Ind.App., 383 N.E.2d 382; *Fleetwood v. State,* (1976) Ind.App., 343 N.E.2d 812; *Landers v. State,* (1975) Ind.App., 331 N.E.2d 770.

(b) Unconstitutional Shifting of Burden of Proof

Stemper asserts, alternatively, that the verdict is contrary to law because the burden of proving sudden heat was shifted to him. He contends that such a shifting of

the burden of proof was found in *Mullaney v. Wilbur,* (1975) 421 U.S. 684 to be unconstitutional.

Stemper admits that this allegation of error was not properly preserved for appeal. It is his contention, however, that this is a proper case for application of the fundamental error doctrine. We invoke the doctrine of fundamental error only when a blatant error has occurred which would deny a defendant fundamental due process. *Phillips v. State,* (1978) Ind., 376 N.E.2d 1143; *Williams v. State,* (1978) Ind.App., 383 N.E.2d 416. In reviewing the record and the applicable Indiana law, we conclude that fundamental error did not occur since Indiana's law did not deprive Stemper of due process.

Unlike the Maine law in *Mullaney* which *required* a defendant charged with murder to prove by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter,

> Indiana law *does not have a conclusive presumption* of malice after certain basic facts are shown. Rather Indiana law permits an inference of malice to arise from the proof of certain basic facts. The inference is rebuttable, and *the prosecution still has the ultimate burden of persuasion on the issue.* (emphasis added)

Neff v. State, (1978) Ind.App., 379 N.E.2d 473. Because no conclusive presumption was created and the State still had the burden of proving every element of the offense beyond a reasonable doubt, the Indiana law did not unconstitutionally shift the burden of proof to Stemper. *See Patterson v. New York,* (1977) 432 U.S. 197.

We affirm.

Miller and Young, JJ. concur.